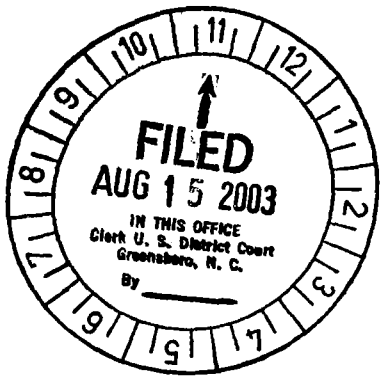
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ALBERT L. FREEMAN, Plaintiff, v. DUKE POWER COMPANY, a division OF DUKE ENERGY CORPORATION, and DUKE ENERGY CORPORATION Defendants.	)	1:00CV00665
ALBERT L. FREEMAN, Plaintiff, v. CINDY THAXTON, an individual, and GREGORY KWASCHA, an individual Defendants.	)	1:02CV00630



MEMORANDUM OPINION

TILLEY, Chief Judge

In the 1:00CV00665 action, the following motions are currently pending before the court: Plaintiff's Motion to Remand [Doc. # 7], Defendant's Motion to Dismiss [Doc. # 11], Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. # 25], Plaintiff's Motion to Amend the Complaint [Doc. # 28], Defendant's Motion to Consolidate [Doc. # 31].

In the 1:02CV00630 case, the following motions are pending: Defendant's

Motion to Dismiss [Doc. #3], Defendant's Motion to Consolidate [Doc. # 5], and Plaintiff's Motion to Remand [Doc. # 8].

For the reasons set forth below, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. # 7] is DENIED, Defendant's Motion to Dismiss [Doc. # 11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. # 25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. # 28] is DENIED, Defendant's Motion to Consolidate [Doc. # 31] is MOOT.

In the 1:02CV00630 case, Defendant's Motion to Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. # 5] is MOOT, and Plaintiff's Motion to Remand [Doc. # 8] is DENIED.

I.

The allegations of the complaint, stated in the light most favorable to the plaintiff, are as follows: Plaintiff Albert Freeman was employed by Duke Power from 1983 to 1999 as a Transmission Line Helper and as a Distribution Line Technician C in Burlington, North Carolina. In 1984, Mr. Freeman obtained a limited electrical contractor's license and "moonlighted" as an electrician during his off duty hours. Mr. Freeman also alleges that Duke Power was aware of his moonlighting and "utilized Freeman's services as an electrician in the rewiring of Duke Power buildings." (Cmp. ¶ 7.)

In 1990, Duke Power transferred a district manager, Ed Holt, to Burlington. Holt did not like "moonlighting" and accused Mr. Freeman of moonlighting during

his Duke Power work day. Around January 26, 1994, Mr. Freeman was suspended and discharged from his employment as a lineman for Duke Power "for allegedly 'removing a service drop and meter and disconnecting service to a customer without authorization from Duke Power Company'" while he was moonlighting. (Cmp. ¶ 11). The union filed a grievance on Mr. Freeman's behalf. Mr. Freeman, the Union, and Duke Power settled the grievance and entered into a Grievance Resolution on June 20, 1994. Pursuant to this agreement, Duke Power agreed to reinstate Mr. Freeman with no loss of service but with no back pay. The Union agreed to withdraw the grievance. The parties also agreed that if Mr. Freeman engaged "directly or indirectly in the business of electrical contracting while employed with Duke Power, Duke Power could terminate Mr. Freeman's employment for that reason," and Duke Power's decision "shall be final and shall not be subject to review under any grievance or arbitration provision under any Collective Bargaining Agreement in effect at the time of his discharge." (Cmp. ¶ 12.) This agreement was signed by the Duke Power area manager for Burlington/Reidsville, the business manager for the Union, and Mr. Freeman.

In June 1996, Duke Power again suspended Mr. Freeman "allegedly for engaging in the business of electrical contracting." (Cmp. ¶ 14). Mr. Freeman denied having breached the June 1994 Grievance Resolution agreement. In July 1996, Duke Power, the Union, and Mr. Freeman entered into an Amendment to the Grievance Resolution, which provided that Mr. Freeman was prohibited from "being

or becoming employed on a full or part-time basis with any person, firm, or corporation engaging in the business of electrical contracting." (Cmp. ¶ 16). In July 1999, Mr. Freeman was terminated for allegedly violating the Amended Grievance Resolution. Mr. Freeman denies that he violated the Amended Grievance Resolution. The Union did not file a grievance on behalf of Mr. Freeman.

Mr. Freeman filed the action against Duke Power in the General Court of Justice Superior Court Division, Alamance County on June 30, 2000. Mr. Freeman alleges numerous causes of action including: breach of contract, wrongful discharge, a violation of Article 1, Section 1 of the North Carolina State Constitution, and bad faith discharge.

Mr. Freeman filed the action against Cindy Thaxton, Regional Human Resources Manager for Duke Power, and Gregory Kwascha, Burlington Area Manager for Duke Power, in the General Court of Justice Superior Court Division, Alamance County on June 28, 2002. In that case, Mr. Freeman seeks recovery for interference with contract and unfair and deceptive trade practices. The defendants in both actions filed timely notices of removal.

II.

The Defendants have filed motions to consolidate these cases. For purposes of considering the motions to dismiss, the cases will be consolidated. In light of the fact that the motions to dismiss will be granted, see discussion below, the Defendants' Motions to Consolidate are MOOT.

Mr. Freeman has filed motions to remand the cases to the Superior Court of Alamance County. Title 28 U.S.C. § 1447(c) requires that a case must be remanded to the state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c) (West Supp. 2002). In the motion to remand, Mr. Freeman asserts that the complaints are based purely on state law and do not raise any federal issues. Defendants, however, assert that federal jurisdiction in these cases is proper because the complaint alleges a breach of a contract between "an employer and a labor organization representing employees in an industry affecting commerce pursuant to Section 301 of the Labor Management Relations Act" ("LMRA").

Generally, the "well-pleaded complaint" rule requires that the federal question appear on the face of the plaintiff's properly pleaded complaint in order for a federal court to exercise jurisdiction. Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). In this case, Mr. Freeman has alleged numerous state law causes of action. Against Duke Power, Mr. Freeman has alleged breach of contract, wrongful discharge in violation of public policy, direct claims under Article I, Section 1 and Article I, Section 19 of the North Carolina Constitution, and bad faith discharge. As to Ms. Thaxton and Mr. Kwascha, Mr. Freeman has alleged interference with contract and unfair and deceptive trade practices.

On the face of Mr. Freeman's complaint, he appears to raise only state law claims. However, the general rule that the federal question must appear on the

face of the plaintiff's complaint is subject to an important exception; "an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (citations omitted). If a plaintiff has "artfully pleaded" so that federal jurisdiction appears improper, the case may nevertheless be removed if federal law completely preempts a plaintiff's state-law claim because "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, 482 U.S., at 393.

The defendants assert that Mr. Freeman's complaint, alleging state law causes of action, is actually a suit for breach of a labor contract under the LMRA and that federal jurisdiction is proper pursuant to § 301 of the LMRA. Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Mr. Freeman asserts that he is not seeking relief based on a collective bargaining agreement but that the Grievance Resolution and the Amended Grievance Resolution ("the agreements") are independent contracts unrelated to the Collective Bargaining Agreement that can be enforced pursuant to state law.

The Fourth Circuit, however, has rejected Mr. Freeman's argument. The Fourth Circuit has held that a settlement agreement that results from an employee grievance filed pursuant to a collective bargaining agreement is not an independent employment contract enforceable pursuant to state law. Rather, such an agreement is a modification or "rider" to the collective-bargaining agreement, which raises a federal question. Davis v. Bell Atlantic-West Virginia, Inc., 110 F.3d 245, 249 (4th Cir. 1997).

In Davis, the plaintiff had been discharged due to excessive absenteeism. She filed a grievance through the Union pursuant to the collective bargaining agreement. Bell Atlantic, the Union, and Ms. Davis reached a settlement agreement providing for reinstatement without backpay or damages. The agreement also provided that Ms. Davis would retain the service credit she had received prior to the discharge. Finally, the agreement provided that Ms. Davis would be subject to immediate dismissal for future tardies or absences. Id. Ms. Davis was tardy on numerous occasions following the execution of the settlement agreement and was terminated.

Ms. Davis filed suit in state court alleging that Bell Atlantic had breached the terms of the collective bargaining agreement and the settlement agreement and also filed a state law tort claim for wrongful discharge. Bell Atlantic removed the case the federal court, and the district court denied Ms. Davis' motion to remand on the grounds that the state law claims were preempted by the LMRA. Id.

The Fourth Circuit rejected Ms. Davis' argument that her claim for breach of the settlement agreement was an independent state law claim. Id. at 247. The Fourth Circuit found that the settlement agreement's validity was based upon the collective bargaining agreement because the settlement agreement was reached only through the grievance procedure specified in the collective bargaining agreement. The Court also noted that the settlement agreement specified that Ms. Davis would be credited for her service prior to her initial discharge, and that the service credit "relate[d] to the underlying work relationship between Davis and Bell Atlantic and require[d] reference to the collective-bargaining agreement for interpretation and application." Id. at 249.

Mr. Freeman's case mirrors the facts before the Fourth Circuit in Davis. Mr. Freeman, as Ms. Davis, challenged his initial discharge through the grievance procedure specified in the collective bargaining agreement. The agreements between Duke Power, Mr. Freeman, and the Union, like the settlement agreement in Davis, provided that Mr. Freeman would be credited for his service prior to the discharge, would not receive back pay, and would be terminated for any future violation of the agreements. As in Davis, the agreements are not independent contracts enforceable under state law but are riders to the collective bargaining agreement. Mr. Freeman's complaint raises issues that "arise under" federal law and federal jurisdiction is proper. The motions to remand are DENIED.

III.

Since jurisdiction is proper pursuant to § 301 of the LMRA, it is now necessary to determine whether the state law claims alleged by Mr. Freeman are preempted by § 301.[1] In Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983), the Supreme Court explained that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" Id. at 23.

However, the Supreme Court has also made it clear that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985). The Supreme Court has explained that determining whether a state law claim preempted by § 301 depends on whether the state law claim "is inextricably intertwined with consideration of the terms of the labor contract." Id. at 213. If the state law claim requires an interpretation of the labor contract, then the state law claims would be preempted. Thus, it is necessary to consider the causes of action alleged by Mr. Freeman and decide whether resolution of the state law

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[1] The defendants have attached the grievance settlement agreements and the collective bargaining agreement to their moving papers. Mr. Freeman has filed a motion to strike. Because it is unnecessary to consider these attachments, the motion to strike is MOOT.

claims would require interpretation of the collective bargaining agreement or riders to the agreement.

Mr. Freeman's first state law claim alleges that Duke Power breached his employment contract. Determining whether Duke Power breached the contract will necessarily involve interpretation of the contract. Thus, it is clear that a breach of contract claim would be preempted. See Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 210-12 (explaining the preemptive effect of § 301 as applied to breach of contract claims).

Similarly, Mr. Freeman's tortious interference with contract claim against Ms. Thaxton and Mr. Kwascha is preempted by § 301. The claim stated is for tortious interference with contract, the elements of which are as follows: (1) a valid contract between plaintiff and a third person; (2) defendants had knowledge of the contract; (3) defendants intentionally induced the third person not to perform the contract; (4) in doing so defendants acted without justification; and (5) plaintiff was damaged thereby. United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). In the complaint, Mr. Freeman alleges that Ms. Thaxton and Mr. Kwascha "exceeded their authority," recommended his dismissal "without proper investigation and without a thorough review of the facts, and "acted outside the scope of their employment." Comp. ¶ 11, 12, 17. It will be necessary to analyze the collective bargaining agreement to determine the scope of supervisor authority, the requirements for a proper investigation prior to

recommending dismissal, and whether Mr. Freeman's actions violated the riders to the collective bargaining agreement. The tortious interference with contract claim is preempted.

Next, Mr. Freeman asserts that he was wrongfully discharged in violation of public policy. North Carolina has recognized a claim for wrongful discharge based on public policy as an exception to the employment-at-will doctrine. Coman v. Thomas Manufacturing Co., 325 N.C. 172, 381 S.E.2d 445 (1989). In the original complaint, Mr. Freeman Mr. Freeman alleged that he was a "member of Local Union 962, International Brotherhood of Electrical Workers, which Union had, at all times relevant hereto, a collective bargaining agreement with the Defendant Duke Power." Comp. ¶ 4. Because wrongful discharge in violation of public policy is an exception to the at-will doctrine, the North Carolina Court of Appeals has held that contract employees cannot state a cause of action for wrongful discharge in violation of public policy. Houpe v. City of Statesville, 128 N.C. App. 334, 343, 497 S.E.2d 82, 88 (1998) (citations omitted) (explaining that [w]rongful termination may be asserted "only in the context of employees at will," and not by an employee "employed for a definite term or . . . subject to discharge only for 'just cause'").

Mr. Freeman filed a motion to amend his complaint pursuant to Federal Rule

of Civil Procedure 15(a) to allege that he was an "at will employee."[2] Determining whether Mr. Freeman was an at will employee who could bring a wrongful discharge action would require consideration of the terms of the collective bargaining agreement and the grievance settlement agreements. As such, Mr. Freeman's claim that he was wrongfully discharged is preempted by § 301. Mr. Freeman also alleges that Ms. Thaxton and Mr. Kwascha's conduct regarding his termination constitute an unfair and deceptive trade practice under North Carolina law. Assuming that an unfair and deceptive trade practice claim would not be preempted by § 301, Mr. Freeman has failed to state a claim for relief. To state a claim for relief for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, a plaintiff must show (1) an unfair or deceptive act or practice by the defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff. Miller v. Nationwide Mut. Ins. Co., 112 N.C .App. 295, 435 S.E.2d 537 (1993). As the North Carolina Supreme Court has explained, the Unfair and Deceptive Trade Practices Act was intended to benefit consumers, Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986). The North Carolina Court of Appeals has explained that "employer-employee relationships do not fall within the intended scope" of Chapter

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[2] The Motion to Amend is DENIED. The Fourth Circuit has explained that proposed amendments may be denied on the basis of futility if the claims the plaintiff seeks to add would not survive a motion to dismiss. See Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294-95 (4th Cir. 1999).

75 because "[e]mployment practices fall within the purview of other statutes adopted for that express purpose." Buie v. Daniel International, 56 N.C.App. 445, 448, 289 S.E.2d 118, 119-20 (1982). It is undisputed that Mr. Freeman's claims arise from his employment. The defendants' motion to dismiss the unfair and deceptive trade practices act claim is GRANTED.

Mr. Freeman has also alleged a claim for bad faith discharge and direct claims under Article I, Sections 1 and 10. North Carolina does not recognize an independent tort for bad faith discharge. Amos v. Oakdale Knitting Co., 331 N.C. 348, 359, 416 S.E.2d 166, 173 (1992). Duke Power's Motion to Dismiss the bad faith discharge claim is GRANTED and the claim is DISMISSED.

Article I, section 1 of the North Carolina Constitution provides:

> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

Mr. Freeman asserts that the "moonlighting" provision in the settlement agreements violates the "fruits of their own labor" provision in Article I, section 1 of the North Carolina Constitution. The North Carolina Court of Appeals, however, has previously rejected this argument holding that Article I, Section 1 "does not give [the plaintiff] a remedy against a corporate defendant" in a private dispute. Teleflex Information Systems, Inc. v. Arnold, 132 N.C. App. 689, 693, 513 S.E.2d 85, 88 (1999) (citing Real Estate Licensing Board v. Aikens, 31 N.C. App. 8, 13, 228 S.E.2d 493, 496 (1976) and explaining that the "fundamental provisions of

our State Constitution, such as Article I, § 1, were inserted to guarantee the right to pursue ordinary and simple occupations free from *governmental* regulation") (emphasis added) (internal quotations omitted). Duke Power's Motion to Dismiss the Article I, Section 1 claim is GRANTED and the claim is DISMISSED.

Article I, Section 19 of the North Carolina Constitution, often referred to as the Law of the Land Clause, is considered the equivalent of the Due Process Clause of the United States Constitution. Lorbacher v. Housing Authority of the City of Raleigh, 127 N. C. App. 663, 674-75, 493 S.E.2d 74, 81 (1997). A direct claim under the North Carolina Constitution can be made in the absence of an adequate legal remedy. Corum, 330 N.C. at 782, 413 S.E.2d at 289. As discussed below, Mr. Freeman was entitled to seek relief pursuant to § 301 of the LMRA. He is not without an adequate legal remedy and thus cannot state a claim directly under the North Carolina Constitution. Duke Power's Motion to Dismiss the Article I, Section 19 claim is GRANTED and the claim is DISMISSED.

IV.

Finally, because Mr. Freeman's state law claims are preempted by § 301 of the LMRA, it is necessary to determine whether Mr. Freeman has stated a viable claim under § 301, which allows an aggrieved employee the right to bring a suit in federal court. To state a claim against an employer for breach of a collective bargaining agreement under §301, the employee must first "attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining

agreement." Vaca v. Sipes, 386 U.S. 171, 184 (1967). If those administrative remedies have been exhausted, the plaintiff must also establish that "the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." Id. at 186.

In this case, it is not necessary to consider whether Mr. Freeman has satisfied these two prongs because he did not file his action within the applicable time period. A six month statute of limitations controls a suit brought under § 301 alleging a breach of contract against the employer and failure of proper representation against the union. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 172 (1983). Mr. Freeman was terminated in July 1999. His action in the state court was filed on June 30, 2000, outside the six month statute of limitations. The Defendants' Motions to Dismiss are GRANTED, and this case is DISMISSED.

V.

In summary, in the 1:00CV00665 action, Plaintiff's Motion to Remand [Doc. # 7] is DENIED, Defendant's Motion to Dismiss [Doc. # 11] is GRANTED, Plaintiff's Motion to Exclude Evidence and for Leave to Take Discovery [Doc. # 25] is MOOT, Plaintiff's Motion to Amend the Complaint [Doc. # 28] is DENIED, Defendant's Motion to Consolidate [Doc. # 31] is MOOT.

In the 1:02CV00630 case, Defendant's Motion to Dismiss [Doc. #3] is GRANTED, Defendant's Motion to Consolidate [Doc. # 5] is MOOT, and Plaintiff's

Motion to Remand [Doc. # 8] is DENIED.

This the 15th day of August, 2003.

United States District Judge